

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

VINCENT DePASQUALE,

Petitioner,

vs.

E.K. McDANIEL, *et al.*,

Respondents.

3:07-cv-00472-ECR-VPC

ORDER

This action is a petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, by Vincent DePasquale, a Nevada state prisoner represented by counsel. This matter comes before the Court on the merits of the second amended petition for a writ of habeas corpus.

I. Procedural History & Background

A. Original State Court Proceedings

On August 10, 1988, petitioner Vincent DePasquale was charged by criminal complaint with open murder and possession of a dangerous weapon by a prisoner, concerning the murder of Ronald Cane at the Nevada State Prison, in Carson City, Nevada. (Exhibit 1).¹

¹ Exhibits 1-190 were filed in the original case number 3:00-cv-0209-ECR-PHA, and were transferred to the instant case, where they are found at Docket #2-15. Exhibits 191-214 are found in the instant action at Docket #34. Petitioner's Exhibits A-F, submitted with the second amended petition, are found at Docket #17-22.

1 On September 1, 1988, a conditional waiver of preliminary hearing was executed so that
2 petitioner could undergo a competency evaluation. (Exhibit 6). A criminal information was also
3 filed reflecting the charges in the criminal complaint. (Exhibit 3).

4 On September 27, 1988, the district court ordered that petitioner be examined by two
5 psychiatrists to determine his competency to stand trial. (Exhibit 8).

6 On November 29, 1988, the district court conducted a competency hearing. The court relied
7 upon the opinion of two psychiatrists in finding that petitioner was competent to proceed to trial.
8 The matter was then remanded to justice court for a preliminary hearing. (Exhibit 12).

9 A preliminary hearing was conducted on January 26, 1989. Following the presentation of
10 testimony, petitioner was bound over to district court for trial on a charge of murder. (Exhibit 15).
11 Prior to the presentation of testimony, the State dismissed the second count against petitioner,
12 possession of a dangerous weapon by a prisoner. (Exhibit 15, at pp. 4-5). On January 18, 1989, an
13 amended criminal information was filed charging petitioner with open murder. (Exhibit 18).

14 On January 24, 1989, the State notified the court of its intent to seek the death penalty and
15 petitioner entered his pleas of not guilty and not guilty by reason of insanity. (Exhibit 19). On
16 January 30, 1989, the State filed its formal notice of intent to seek the death penalty. (Exhibit 23).

17 On April 25, 1989, petitioner filed a motion to suppress regarding a statement he gave
18 following the murder. (Exhibit 28). The state district court granted the motion to suppress the
19 statement. (Exhibit 64, at pp. 91-92).

20 On May 3, 1989, the State filed a motion to have petitioner undergo a psychiatric evaluation.
21 (Exhibit 31). The State also moved for an order requiring petitioner to undergo a neurological
22 examination. (Exhibit 35). The court granted the motion on May 15, 1989. (Exhibit 42).

23 On June 13, 1989, the court conducted a second competency hearing, after which it
24 suspended petitioner's trial dates and ordered further evaluation. (Exhibits 50, 51, and 53).

25 On September 5, 1989, the court conducted a further competency hearing, heard testimony
26 from medical personnel, prison personnel, and questioned the defendant. (Exhibit 64). The court

1 then issued an order finding the defendant competent to stand trial. (Exhibit 65).

2 Jury trial commenced on September 6, 1989. (Exhibits 66-76). At the conclusion of the guilt
3 phase of the trial, the jury returned a verdict of guilty of murder in the first degree. (Exhibit 72, at
4 pp. 155-156). At the conclusion of the penalty phase of trial, the jury found that the mitigating
5 circumstances did not outweigh the aggravating circumstances, and set petitioner's penalty at death.
6 (Exhibit 74).

7 On September 25, 1989, petitioner filed a motion for a new trial, alleging that the jury's
8 verdict was illogical based on the evidence presented at trial. (Exhibit 77).

9 The judgment of conviction was entered on September 26, 1989, pursuant to which petitioner
10 was adjudged guilty of first-degree murder and sentenced to death. (Exhibit 78).

11 On September 26, 1989, petitioner filed his notice of appeal. (Exhibit 81). On October 2,
12 1989, the trial court denied petitioner's motion for a new trial. (Exhibit 87). On April 10, 1990,
13 petitioner filed his opening brief on direct appeal. (Exhibit 94). On December 7, 1990, the Nevada
14 Supreme Court affirmed petitioner's conviction in a published opinion. (Exhibit 104, reported at
15 *DePasquale v. State*, 106 Nev. 843, 803 P.2d 218 (1990)).

16 On December 24, 1990, petitioner filed his petition for rehearing. (Exhibit 105). The
17 petition for rehearing was denied on March 12, 1991. (Exhibit 109). On March 27, 1991, petitioner
18 filed a second petition for rehearing or to re-open briefing. (Exhibit 112). Petitioner's second
19 petition for rehearing or to re-open briefing was denied on May 2, 1991. (Exhibit 116). On May 7,
20 1991, petitioner petitioned the United States Supreme Court for a writ of certiorari. (Exhibit 119).
21 On October 7, 1991, the petition for a writ of certiorari was denied. (Exhibit 126). On October 23,
22 1991, remittitur issued from petitioner's direct appeal. (Exhibit 127).

23 On March 5, 1992, petitioner filed his state post-conviction petition for a writ of habeas
24 corpus, in which he claimed trial counsel was ineffective. (Exhibit 130). On July 13, 1992, the court
25 ordered an evidentiary hearing on the petition. (Exhibit 145). On January 6, 1993, the State and
26 petitioner signed a memorandum of agreement in which petitioner agreed to dismiss his petition for

1 writ of habeas corpus, the State agreed to make an unspecified confession of error at the penalty
2 hearing, and the parties agreed that, subject to court approval, petitioner's sentence would be
3 converted from the death penalty to life without the possibility of parole. (Exhibit 152). Prior to
4 petitioner signing the agreement, the court conducted a canvass of petitioner and made findings that
5 petitioner was competent to sign the agreement and that he did so voluntarily. (Exhibit 153). On
6 January 19, 1993, the court entered an amended judgment of conviction reflecting a new sentence of
7 life without the possibility of parole. (Exhibit 154).

8 **B. United States District Court Case No. 3:00-cv-0209-ECR-VPC**

9 On March 13, 2000, petitioner dispatched his *pro se* federal habeas petition to this Court.
10 The petition was received by this Court on April 14, 2000, and was opened as case number 3:00-cv-
11 0209-ECR-PHA. On November 9, 2000, counsel was appointed to represent petitioner. (ECF No.
12 18). On April 22, 2002, the first amended petition was filed by petitioner's counsel. (ECF No. 47).
13 On May 20, 2002, petitioner filed a statement of additional unexhausted claims. (ECF No. 50).

14 On June 28, 2002, respondents filed a motion to dismiss on grounds of untimeliness of the
15 petition and failure to exhaust certain claims. (ECF No. 52). On March 4, 2003, this Court held an
16 evidentiary hearing and heard expert testimony regarding petitioner's mental capacity during the time
17 in which he did not have a valid federal or state petition pending, for purposes of determining the
18 appropriateness of equitable tolling. (ECF No. 79). On March 7, 2003, this Court denied the motion
19 to dismiss on timeliness grounds but granted the motion to dismiss on the remaining exhaustion
20 grounds. (ECF No. 81). Pursuant to options given by this Court, on April 4, 2003, petitioner elected
21 to dismiss his petition and return to state court to exhaust his unexhausted claims. (ECF No. 82).
22 On April 11, 2003, the Court ordered the action dismissed without prejudice while petitioner
23 returned to state court to exhaust his claims. (ECF No. 83).

24 **C. Return to State Court**

25 On July 15, 2003, petitioner filed a state habeas petition. (Exhibit 192). On January 20,
26 2005, the state district court entered an order dismissing the petition. (Exhibit 197). On February

1 18, 2005, petitioner filed a notice of appeal. (Exhibit 199). On October 20, 2005, petitioner filed his
2 opening brief on appeal from the dismissal of his state petition. (Exhibit 207). On May 2, 2006, the
3 Nevada Supreme Court issued its order of affirmance. (Exhibit 212). Remittitur issued on May 30,
4 2006. (Exhibit 214).

5 **D. Return to United States District Court: Case No. 3:07-cv-0472-ECR-VPC**

6 On February 15, 2007, petitioner filed a second amended petition in this Court. (ECF No.
7 16). On October 10, 2007, this Court filed an order reopening the case under the above-captioned
8 case number, 3:07-cv-0472-ECR-VPC. (ECF No. 1). The exhibits from the 2000 case were
9 transferred to the new case. (ECF No. 1). On April 18, 2008, respondents moved to dismiss the
10 second amended petition. (ECF No. 33). By order filed March 19, 2009, this Court determined that
11 Grounds 1-6 of the second amended petition were procedurally defaulted in state court on adequate
12 and independent state grounds. (ECF No. 64, at p. 9). The Court deferred ruling on the cause and
13 prejudice issue and the fundamental miscarriage of justice issue until the merits were fully briefed.
14 (*Id.*, at pp. 9-10). In the same order, the Court denied petitioner's request for an evidentiary hearing.
15 (*Id.*, at pp. 10-11). The Court directed respondents to file an answer to the second amended petition,
16 and petitioner to file a reply to the answer. (*Id.*, at pp. 11-12).

17 On April 20 and April 21, 2009, respondents filed a motion for an extension of time to file an
18 answer and a supplemental motion, in which the Court was informed of petitioner's anticipated
19 motion for expansion of the record. (ECF No. 65 & ECF No. 66). On May 6, 2009, this Court
20 granted respondents' motion for extension of time, and set a deadline by which petitioner could file a
21 motion for expansion of the record. (ECF No. 67). On July 14, 2009, petitioner filed a motion to
22 expand the record, and in the alternative, motion for an evidentiary hearing. (ECF No. 72).
23 Respondents opposed the motion. (ECF No. 74). By order filed December 22, 2009, this Court
24 denied petitioner's motion to expand the record. (ECF No. 79). The Court ordered stricken from the
25 record petitioner's proposed exhibits G, H, I, J, and K, which were filed in support of the motion to
26 expand the record. (ECF No. 79, at p. 6). The Court directed an answer to the second amended

petition and a reply. Respondents have filed an answer (ECF No. 85) and petitioner has filed a reply (ECF No. 98). The Court now addresses the merits of the second amended petition.

II. Federal Habeas Corpus Standards

The Antiterrorism and Effective Death Penalty Act (“AEDPA”), at 28 U.S.C. § 2254(d), provides the legal standard for the Court’s consideration of this habeas petition:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The AEDPA “modified a federal habeas court’s role in reviewing state prisoner applications in order to prevent federal habeas ‘retrials’ and to ensure that state-court convictions are given effect to the extent possible under law.” *Bell v. Cone*, 535 U.S. 685, 693-694 (2002). A state court decision is contrary to clearly established Supreme Court precedent, within the meaning of 28 U.S.C. § 2254, “if the state court applies a rule that contradicts the governing law set forth in [the Supreme Court’s] cases” or “if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [the Supreme Court’s] precedent.” *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 405-406 (2000) and citing *Bell v. Cone*, 535 U.S. 685, 694 (2002)).

A state court decision is an unreasonable application of clearly established Supreme Court precedent, within the meaning of 28 U.S.C. § 2254(d), “if the state court identifies the correct governing legal principle from [the Supreme Court’s] decisions but unreasonably applies that principle to the facts of the prisoner’s case.” *Lockyer v. Andrade*, 538 U.S. at 75 (quoting *Williams*, 529 U.S. at 413). The “unreasonable application” clause requires the state court decision to be more

1 than merely incorrect or erroneous; the state court's application of clearly established federal law
2 must be objectively unreasonable. *Id.* (quoting *Williams*, 529 U.S. at 409).

3 In determining whether a state court decision is contrary to, or an unreasonable application of
4 federal law, this Court looks to the state courts' last reasoned decision. *See Ylst v.*
5 *Nunnemaker*, 501 U.S. 797, 803-04 (1991); *Shackleford v. Hubbard*, 234 F.3d 1072, 1079 n.2 (9th
6 Cir. 2000), *cert. denied*, 534 U.S. 944 (2001). Moreover, "a determination of a factual issue made
7 by a State court shall be presumed to be correct," and the petitioner "shall have the burden of
8 rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

9 **III. Discussion**

10 **A. Procedural Default of Grounds 1-6**

11 A federal court will not review a claim for habeas corpus relief if the decision of the state
12 court regarding that claim rested on a state law ground that is independent of the federal question and
13 adequate to support the judgment. *Coleman v. Thompson*, 501 U.S. 722, 730-31 (1991). The
14 *Coleman* Court stated the effect of a procedural default, as follows:

15 In all cases in which a state prisoner has defaulted his federal claims in
16 state court pursuant to an independent and adequate state procedural
17 rule, federal habeas review of the claims is barred unless the prisoner
18 can demonstrate cause for the default and actual prejudice as a result of
the alleged violation of federal law, or demonstrate that failure to
consider the claims will result in a fundamental miscarriage of justice.

19 *Coleman*, 501 U.S. at 750; *see also Murray v. Carrier*, 477 U.S. 478, 485 (1986). By order filed
20 March 19, 2009, this Court determined that Grounds 1 through 6 of the second amended petition
21 were procedurally defaulted in state court on independent and adequate state grounds of NRS 34.726
22 (timeliness), NRS 34.810(2) (successive petition and abuse of the writ), and NRS 34.800(2)
23 (latches). (ECF No. 64, at pp. 7-9). This Court deferred ruling on the issue of cause and prejudice
24 until the merits of the petitioner were briefed. (ECF No. 64, at pp. 9-10). As such, the Court now
25 considers the parties' arguments concerning cause and prejudice and fundamental miscarriage of
26 justice to overcome procedural default.

To overcome a procedural default, a petitioner must establish either (1) "cause for the default

1 and prejudice attributable thereto,” or (2) “that failure to consider [his defaulted] claim[s] will result
 2 in a fundamental miscarriage of justice.” *Harris v. Reed*, 489 U.S. 255, 262 (1989) (citations
 3 omitted). Petitioner also must show prejudice to excuse the procedural default. The prejudice that is
 4 required as part of the showing of cause and prejudice to overcome a procedural default is “actual
 5 harm resulting from the alleged error.” *Vickers v. Stewart*, 144 F.3d 613, 617 (1998); *Magby v.*
 6 *Wawrzaszek*, 741 F.2d 240, 244 (9th Cir. 1984).

7 **B. Cause and Prejudice Analysis**

8 “Cause” to excuse a procedural default exists if a petitioner can demonstrate that some
 9 objective factor external to the defense impeded the petitioner’s efforts to comply with the state
 10 procedural rule. *Coleman v. Thompson*, 501 U.S. at 755; *Murray v. Carrier*, 477 U.S. at 488;
 11 *Vickers v. Stewart*, 144 F.3d 613, 617 (9th Cir. 1998). Ineffective assistance of counsel may satisfy
 12 the cause requirement to overcome a procedural default. *Murray*, 477 U.S. at 488. However, for
 13 ineffective assistance of counsel to satisfy the cause requirement, the independent claim of
 14 ineffective assistance of counsel, itself, must first be presented to the state courts. *Murray*, 477 U.S.
 15 at 488-89. In addition, the independent ineffective assistance of counsel claim cannot serve as cause
 16 if that claim is procedurally defaulted. *Edwards v. Carpenter*, 529 U.S. 446, 453 (2000).

17 With respect to the prejudice prong of cause and prejudice, the petitioner bears:

18 the burden of showing not merely that the errors [complained of]
 19 constituted a possibility of prejudice, but that they worked to his actual
 20 and substantial disadvantage, infecting his entire [proceeding] with
 21 errors of constitutional dimension.

22 *White v. Lewis*, 874 F.2d 599, 603 (9th Cir. 1989), citing *United States v. Frady*, 456 U.S. 152, 170
 23 (1982). If the petitioner fails to show cause, the court need not consider whether the petitioner
 24 suffered actual prejudice. *Engle v. Isaac*, 456 U.S. 107, 134 n.43 (1982); *Roberts v. Arave*, 847 F.2d
 25 528, 530 n.3 (9th Cir. 1988).

26 In his opposition to the prior motion to dismiss, which petitioner incorporates by reference in
 the reply, he attempts to show cause for procedural default based on petitioner’s mental illness,
 citing to *Calderon v. United States District Court (Kelly)*, 163 F.3d 530, 541 (9th Cir. 1998). In

1 *Kelly*, the Ninth Circuit ruled that the petitioner was entitled to equitable tolling of the AEDPA
2 statute of limitations due to the petitioner's mental illness. *Id.* Indeed, in the instant case, by order
3 filed March 7, 2003, this Court tolled the AEDPA statute of limitations from April 24, 1996, to June
4 1, 1999, based on findings that petitioner's psychosis affected him such that he was prevented from
5 understanding his legal rights and acting upon them in a rational manner. (ECF No. 81, at p. 12, in
6 case number 3:00-cv-0209-ECR-PHA). The standard for equitable tolling requires petitioner to
7 demonstrate: "'(1) that he has been pursuing his rights diligently, and (2) that some extraordinary
8 circumstance stood in his way' and prevented timely filing.'" *Holland v. Florida*, 130 S.Ct. 2549,
9 2560, 2562 (2010) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)).

10 The equitable tolling standard is not applicable or equivalent to making a showing of cause
11 and prejudice to excuse the procedural default of state law claims. In contrast, to demonstrate cause,
12 petitioner must demonstrate "an objective factor external to the defense impeded [his] efforts to raise
13 the claim in state court." *Robinson v. Ignacio*, 360 F.3d 1044, 1052 (9th Cir. 2004). Petitioner's
14 reliance on a finding of equitable tolling of the AEDPA based on mental illness does not equate to
15 good cause to overcome an adequate and independent state procedural bar.

16 To the extent that petitioner's arguments can be construed as demonstrating cause based on
17 ineffective assistance of counsel, this argument fails. An independent ineffective assistance of
18 counsel claim cannot serve as cause if that claim is itself procedurally defaulted. *Edwards v.*
19 *Carpenter*, 529 U.S. 446, 453 (2000). In the instant case, petitioner argued that his counsel's
20 ineffectiveness is cause to excuse the procedural default. Because the ineffective assistance of
21 counsel claims are themselves procedurally defaulted, such claims cannot be used to establish cause
22 to excuse the procedural default in state court. Petitioner otherwise fails to make a clear argument
23 regarding cause to excuse the procedural default. Because petitioner has failed to show cause to
24 overcome the procedural default, the Court need not address the prejudice prong. *Engle v. Isaac*,
25 456 U.S. 107, 134 n.43 (1982); *Roberts v. Arave*, 847 F.2d 528, 530 n.3 (9th Cir. 1988) (where
26 petitioner fails to show cause, the court need not consider whether the petitioner suffered actual

1 prejudice).

2 **C. Fundamental Miscarriage of Justice Analysis**

3 A petitioner can avoid the application of the procedural default doctrine by demonstrating
4 that the federal court's failure to consider his claims will result in a fundamental miscarriage of
5 justice. To prove a "fundamental miscarriage of justice," petitioner must show that the constitutional
6 error of which he complains "has probably resulted in the conviction of one who is actually
7 innocent." *Bousley v. United States*, 523 U.S. 614, 623 (1998) (citing *Murray v. Carrier*, 477 U.S. at
8 496). "Actual innocence" is established when, in light of all of the evidence, "it is more likely than
9 not that no reasonable juror would have convicted [the petitioner]." *Bousley v. United States*, 523
10 U.S. at 623 (quoting *Schlup v. Delo*, 513 U.S. 298, 327-28 (1995)). "[A]ctual innocence" means
11 factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. at 623.
12 Petitioner can make a showing of "actual innocence" by presenting the court with new evidence
13 which raises a sufficient doubt as "to undermine confidence in the result of the trial." *Schlup v.*
14 *Delo*, 513 U.S. at 324.

15 In his reply, petitioner makes the following argument regarding a fundamental miscarriage of
16 justice:

17 Petitioner is innocent of first degree murder by virtue of his insanity at
18 the time he killed his cell mate, Ronald Cane. Although the most
19 crucial of Mr. DePasquale's claims are procedurally barred, this Court
20 should still redress the egregious harm suffered by petitioner because
21 failure to do so, given his actual innocence, would result in a
22 fundamental miscarriage of justice. Trial counsel James Wessel's total
23 abdication of his role as defense counsel, deprived Mr. DePasquale of
24 his right to effective assistance of counsel and deprived him of his
25 meritorious defense of not guilty by reason of insanity, thus
26 constituting a fundamental miscarriage of justice.

(ECF No. 98, at p. 1). Petitioner provides no new evidence which was not presented to the jury. The
jury had the evidence, found DePasquale guilty of first-degree murder, and rejected the not guilty by
reason of insanity defense. Petitioner has failed to make a showing of actual innocence by
presenting this Court with new evidence which raises a sufficient doubt as to undermine confidence
in the result of the trial. Petitioner has failed to demonstrate that this Court's failure to consider his

1 procedurally defaulted claims would result in a fundamental miscarriage of justice.

2 **D. Analysis of the Merits of Petitioner's Claims**

3 Assuming *arguendo*, that this Court found cause and prejudice or a fundamental miscarriage
4 of justice to allow review of petitioner's procedurally defaulted Grounds 1-6, a substantive analysis
5 of the merits of each claim in the second amended petition is now discussed.

6 **1. Ground One**

7 Petitioner alleges that his state court conviction for murder was unconstitutional in violation
8 of the Sixth and Fourteenth Amendments because trial counsel James Wessel had an actual conflict
9 of interest in his representation of petitioner, which adversely affected his performance and
10 prejudiced petitioner. (ECF No. 16, at p. 15). Petitioner refers to Wessel's gambling problem,
11 financial problems, and actions which resulted in Wessel's eventual disbarment and conviction for
12 the crime of embezzlement.

13 Where the constitutional right to counsel exists, there is a correlative right to representation
14 that is free from conflicts of interest. *Mickens v. Taylor*, 535 U.S. 162 (2002); *Wood v. Georgia*, 450
15 U.S. 261, 271 (1981); *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980). To prevail on a conflict of
16 interest claim, a defendant must show (1) that counsel actively represented conflicting interests and
17 (2) that an actual conflict of interest adversely affected the lawyer's performance. *Mickens*, 535 U.S.
18 at 171. The mere possibility of a conflict is insufficient. *Cuyler*, 446 U.S. at 348. The petitioner
19 must make a factual showing on the record that an actual conflict existed. *Morris v. California*, 966
20 F.2d 448 (9th Cir. 1992). Potentially divided allegiances do not constitute active representation of
21 conflicting interests. *Paradis v. Arave*, 130 F.3d 385, 391 (9th Cir. 1997). Speculation will not
22 substitute for evidence. *Morris v. California*, 966 F.2d 448, 455 (9th Cir. 1992).

23 An "actual conflict" is a conflict that adversely affects counsel's performance. *Mickens*, 535
24 U.S. at 172, n.5. The inquiry into conflict and adverse effect is a single, integrated inquiry. *United*
25 *States v. Wells*, 394 F.3d 725, 733 (9th Cir. 2005). An actual conflict is the initial step in determining
26 the existence of an adverse effect. Under this standard, an actual conflict is one that affected

1 counsel's performance – not a theoretical division of loyalties. *Id.* An adverse effect must be one
2 that “significantly worsens counsel’s representation of the client before the court or in negotiations
3 with the government.” *United States v. Mett*, 65 F.3d 1531, 1535 (9th Cir. 1995).

4 In *Mickens*, the United States Supreme Court declined to approve the application of a
5 presumed prejudice rule to conflicts other than those caused by the joint representation of two or
6 more defendants. *Mickens*, 535 U.S. at 174-75. The Court in *Mickens* noted that the lower courts
7 had applied the presumed prejudice rule of *Cuyler* “unblinkingly to all kinds of attorney ethical
8 conflicts,” including alleged conflicts involving counsel’s “personal or financial interests.” *Mickens*,
9 535 U.S. at 174 (internal citations and quotation marks omitted). The *Mickens* Court opined that
10 *Cuyler* did not support such an expansive application, and admonished that the purpose of a
11 presumed prejudice rule was “not to enforce the Canons of Legal Ethics.” *Id.* at 175-76. “*Mickens*
12 explicitly concluded [that the presumed prejudice rule of *Cuyler*] was limited to joint representation,
13 and that any extension of [*Cuyler*] outside of the joint representation at trial context remained, as far
14 as the jurisprudence of [the United States Supreme Court was] concerned, an open question.” *Footte*
15 *v. Del Papa*, 492 F.3d 1026, 1030 (9th Cir. 2007) (quoting *Earp*, 431 F.3d at 1184 and *Mickens*, 535
16 U.S. at 176) (internal quotation marks omitted).

17 In the instant case, petitioner does not allege a conflict of interest caused by the joint
18 representation of more than one defendant. Instead, petitioner alleges that a conflict arose as a result
19 of personal events in trial attorney Wessel’s life. Pursuant to United States Supreme Court law,
20 there must be an actual conflict of joint representation before there can be any presumption of
21 prejudice. Petitioner is not entitled to federal habeas relief because no clearly established United
22 States Supreme Court law extends to the presumption of prejudice to a purported conflict of interest
23 caused by an attorney’s personal issues. *See Carey v. Musladin*, 549 U.S. 70, 76-77 (2006).
24 Petitioner has failed to demonstrate that his trial counsel was functioning under a conflict of interest
25 during his representation. In the reply, petitioner concedes Ground One, “as actual conflict is
26 difficult to prove.” (ECF No. 98, at p. 44). Petitioner has failed demonstrate that personal events in

1 trial counsel Wessel's life adversely affected his representation of petitioner or created an actual
2 conflict. This Court denies habeas relief with respect to Ground One.

3 **2. Ground Two**

4 "DePasquale alleges his conviction and sentence is unconstitutional in violation of his Sixth
5 Amendment right to effective assistance of counsel and his Fourteenth Amendment right to due
6 process when trial counsel Wessel, who was absolutely untrained and unqualified to be lead/only
7 counsel in a death penalty case, rendered ineffective assistance of counsel by committing multiple
8 errors which singularly or cumulatively prejudiced petitioner." (ECF No. 16, at pp. 17-18).

9 Ineffective assistance of counsel claims are governed by the two-part test announced in
10 *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the Supreme Court held that a
11 petitioner claiming ineffective assistance of counsel has the burden of demonstrating that (1) the
12 attorney made errors so serious that he or she was not functioning as the "counsel" guaranteed by the
13 Sixth Amendment, and (2) that the deficient performance prejudiced the defense. *Williams v.*
14 *Taylor*, 529 U.S. 362, 390-391 (2000) (citing *Strickland*, 466 U.S. at 687). To establish
15 ineffectiveness, the defendant must show that counsel's representation fell below an objective
16 standard of reasonableness. *Id.* To establish prejudice, the defendant must show that there is a
17 reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding
18 would have been different. *Id.* A reasonable probability is "probability sufficient to undermine
19 confidence in the outcome." *Id.* Additionally, any review of the attorney's performance must be
20 "highly deferential" and must adopt counsel's perspective at the time of the challenged conduct, in
21 order to avoid the distorting effects of hindsight. *Strickland*, 466 U.S. at 689. It is the petitioner's
22 burden to overcome the presumption that counsel's actions might be considered sound trial strategy.
23 *Id.*

24 Ineffective assistance of counsel under *Strickland* requires a showing of deficient
25 performance of counsel resulting in prejudice, "with performance being measured against an
26 'objective standard of reasonableness,' . . . 'under prevailing professional norms.'" *Rompilla v.*

1 *Beard*, 545 U.S. 374, 380 (2005) (quotations omitted). If the state court has already rejected an
2 ineffective assistance claim, a federal habeas court may only grant relief if that decision was contrary
3 to, or an unreasonable application of the *Strickland* standard. *See Yarborough v. Gentry*, 540 U.S. 1,
4 5 (2003). There is a strong presumption that counsel's conduct falls within the wide range of
5 reasonable professional assistance. *Id.*

6 **Ground 2(a)**

7 DePasquale claims ineffective assistance counsel because trial counsel presented two
8 conflicting defenses: (1) that some inmate other than DePasquale killed the victim; and (2)
9 alternatively, that if the jury believed that DePasquale killed the victim, he was not guilty by reason
10 of insanity. (ECF No. 16, at p. 19). Petitioner asserts that trial counsel was incompetent in asserting
11 those two defenses, given that there was strong physical evidence that DePasquale killed his cell
12 mate and strong evidence that DePasquale, who had been taken off his anti-psychotic medication at
13 the time of the killing, was suffering from a psychotic episode and was insane at the time of the
14 killing. (*Id.*).

15 The Ninth Circuit has refused to second-guess counsel's strategic decision to present or
16 forego a particular theory of defense when the decision was reasonable under the circumstances.
17 *United States v. Chambers*, 918 F.2 1455, 1461 (9th Cir. 1990); *Seidel v. Merkle*, 146 F.3d 750, 756
18 (9th Cir. 1988) (self-defense and mental illness are not mutually exclusive defenses). The mere
19 criticism of counsel's tactics or strategy is insufficient standing alone. *United States v. Vincent*, 758
20 F.2d 379, 382 (9th Cir. 1985).

21 In the instant case, the presentation of the two defenses was not unreasonable and did not
22 prejudice petitioner. Petitioner asserts that the insanity defense was the stronger defense and that he
23 would have prevailed on this defense. Both the State and the defense presented numerous
24 psychiatrists, a neurologist, and a radiologist, to testify as to petitioner's history of mental illness and
25 they reached differing determinations as to petitioner's mental state and condition at the time of the
26 murder. (Exhibits 70-72). Correctional officers, a nurse, and inmates testified for both parties as to

1 petitioner's actions in the days before and after the killing. (Exhibits 69-71). There was conflicting
2 testimony throughout the trial from the various witnesses as to petitioner's mental state at the time of
3 the killing. Petitioner cannot show that, if counsel had presented only the insanity defense, he would
4 have prevailed on this defense.

5 In a written statement filed during the original habeas proceeding, trial counsel Wessel wrote
6 that he made a tactical decision to present two inconsistent defenses. He wrote: "I did not feel either
7 defense was so strong that I should abandon the other. Although there was ample evidence to
8 support Vinnie's mental defects . . . I could not get any expert to say the ultimate fact. Vinne's
9 condition was episodic." (Exhibit 143, at Ex 15, at p. 3). "The experts did not want to say he was
10 insane at the time he allegedly committed the offense when he was apparently able to function
11 normally on a great many days." (*Id.*, at p. 4). Wessel further wrote: "It was my opinion that the
12 factual innocence defense was essential but not so persuasive that I could afford to give up the
13 insanity defense." (*Id.*). Wessel based his decision on his pathologists' conclusion that DePasquale
14 would have been covered with blood, rather than the trace amounts found, if the death occurred
15 consistent with the State's theory. (*Id.*). Wessel's blood splatter expert opined that a blunt
16 instrument was used, but no weapon was ever found. (*Id.*). Wessel wrote that he researched the
17 issue of inconsistent theories and discussed it with other defense attorneys. (*Id.*).

18 While trial attorney Wessel's tactical decision to present inconsistent defenses may be subject
19 to differences of opinion, it does not automatically constitute ineffective assistance of counsel. *See*
20 *Campbell v. Kincheloe*, 829 F.2d 1453, 1464 (9th Cir. 1987). Speculation that using a different trial
21 strategy or tactics would have changed the result is insufficient to show prejudice. *Cook v. Spalding*,
22 660 F.2d 738, 740 (9th Cir. 1991). In the instant case, petitioner has not met his burden of
23 overcoming the presumption that counsel's actions were objectively reasonable under prevailing
24 norms. This Court finds that counsel's representation, including the presentation of inconsistent
25 defense theories, did not fall below an objective standard of reasonableness. Additionally, petitioner
26 has failed to establish prejudice, because he has not shown a reasonable probability that, but for

1 counsel's alleged errors in presenting the two defense theories, the result of the trial would have been
2 different and petitioner would have been found not guilty by reason of insanity. This is particularly
3 so, given the conflicting testimony at trial from the various witnesses as to petitioner's mental state
4 at the time of the killing.

5 Petitioner further argues that trial counsel erred in obtaining a ruling to suppress his tape
6 recorded confession, which would have provided significant evidence of his psychotic state shortly
7 after the killing. (ECF No. 16, at p. 19). During the hearing on the motion to suppress, Dr. Molde
8 testified that petitioner lacked the ability to fully understand what he was doing at the time he waived
9 his *Miranda* rights and made the statements. (Exhibit 64, at p. 36). In granting the motion to
10 suppress, the trial court found that there was a question as to whether petitioner voluntarily made the
11 statements and the court further found that petitioner was not read his *Miranda* rights on at least one
12 occasion. (Exhibit 64, at pp. 91-92). Petitioner now argues that counsel erred in having the
13 confession suppressed, even if that violated petitioner's *Miranda* rights, so long as the statements
14 could be used to support an insanity defense. If counsel had not moved to suppress the statements,
15 there may well be an ineffective assistance of counsel claim based on the failure to protect
16 petitioner's *Miranda* rights. This Court finds that counsel's actions in suppressing the taped
17 confession were reasonable and do not evidence ineffective assistance of counsel. Petitioner also has
18 failed to establish prejudice, because he has not shown a reasonable probability that, but for
19 counsel's alleged error in suppressing the taped confession, the result of the trial would have been
20 different and petitioner would have been found not guilty by reason of insanity. Petitioner's counsel
21 was not ineffective and this Court denies habeas relief with respect to Ground 2(a).

22 **Ground 2(b)**

23 Petitioner alleges that trial counsel failed to conduct adequate voir dire both at the guilt and
24 penalty phases of the trial. Petitioner asserts that trial counsel failed to question jurors as to their
25 opinions on an insanity defense, psychiatric defenses, prisoners having the same rights as other
26 defendants, and the "reverse Witherspoon" question. Counsel passed on six jurors for cause with no

1 questioning, including the juror who later became foreman. DePasquale alleges that this deprived
2 him of a fair and impartial jury. (ECF No. 16, at pp. 19-20).

3 A claim of failure to adequately question jurors will fail where adequate questions are not
4 identified and alleged improperly seated jurors are not identified. *See Cummings v. Sirmons*, 506
5 F.3d 1211, 1228 (10th Cir. 2007). Whether defense counsel will voir dire on a particular subject
6 involves the exercise of judgment which should be left to defense counsel. *Hovey v. Ayers*, 458 F.3d
7 892, 910 (9th Cir. 2006). There is no United States Supreme Court precedent that requires voir dire
8 of each and every potential juror, or that defense counsel must ask specific questions regarding
9 potential defenses, trial tactics, or the “reverse *Witherspoon*” question. Failure to pursue “reverse
10 *Witherspoon*” voir dire constitutes neither ineffective performance nor prejudice. *See Hightower v.*
11 *Schofield*, 365 F.3d 1008, 1040-41 (11th Cir. 2004); *see also Brown v. Jones*, 255 F.3d 1273, 1278-
12 79 (10th Cir. 2001). The accused has the burden of establishing the non-neutrality of the jury.
13 *Witherspoon v. Illinois*, 391 U.S. 510 (1968). Where there is adequate protection by the trial court’s
14 voir dire, there will be no prejudice. *Williams v. Vasquez*, 817 F. Supp. 1443, 1476 (E.D. Cal. 1993),
15 *affirmed in Williams v. Calderson*, 52 F.3d 1465, 1469, n.2 (9th Cir. 1995). To demonstrate
16 prejudice, the petitioner must show that the absence of voir dire on preconceived notions of guilt
17 affected the outcome of the trial. *Paradis v. Arave*, 954 F.2d 1483, 1491 (9th Cir. 1992), *vacated on*
18 *other grounds*, 507 U.S. 1026 (1993), *decision on remand*, 20 F.3d 950 (1994).

19 In the instant case, petitioner fails to identify the six jurors allegedly passed for cause with no
20 questioning, other than identifying juror Larry Berg as the jury foreman. Each juror took an oath to
21 answer each question truthfully. (Exhibit 66, at pp. 2-3, 8). Before beginning the group voir dire,
22 the court notified the jurors that this was a capital murder case and that the possible punishments, if
23 convicted, ranged from life with the possibility of parole to death. (Exhibit 66, at p. 12). The court
24 asked the jurors to consider these possibilities as they could have a bearing on their answers to the
25 court’s questions. (*Id.*, at p. 12). The state district court then addressed the essence of the “reverse
26 *Witherspoon*” question, inquired into the prospective jurors’ moral or ethical difficulties with the

1 death penalty as one possible penalty, inquired whether they acknowledged that there were three
2 possible penalties, inquired of their feelings regarding the fields of psychiatry and psychology,
3 inquired as to their views on inmate status, and inquired as to their feelings regarding the insanity
4 defense. (Exhibit 66).

5 As to the one juror that petitioner identified in the petition, Larry Berg, this juror served as
6 foreman. Berg was among the initial group of potential jurors questioned by the court. (Exhibit 66,
7 at p. 11). During that first panel, the court asked the following group questions regarding: moral,
8 ethical, or religious beliefs preventing them from choosing the alternate penalties; consideration of
9 the guilt or innocence of defendant; existence of three possible punishments; explanation of
10 aggravating versus mitigating circumstances; presumption of truthfulness of all witnesses;
11 consideration of basis because defendant was an inmate; consideration that one of the prospective
12 defenses was not guilty by reason of insanity; inquiry into backgrounds in psychology or psychiatry;
13 acceptance of a plea of not guilty by reason of insanity as a recognized defense; and recognition of
14 the burden of proof. (Exhibit 66, at pp. 21-48). At no time did Berg state that he did not understand
15 the court's questions or otherwise indicate that he could not be an impartial juror.

16 As to juror Berg and the other jurors, petitioner has failed to demonstrate prejudice in this
17 case. Petitioner fails to demonstrate that the jurors were not impartial or how additional voir dire
18 would have changed the jurors seated. Petitioner fails to demonstrate that the venire was not
19 impartial. Petitioner fails to demonstrate that the seated jurors were not acceptable, or were otherwise
20 not impartial or unqualified to sit. In the reply, petitioner concedes that: "In Claim 2B, prejudice is
21 difficult to argue especially in light of the fact the case is not [sic] longer a death case." (ECF No.
22 98, at p. 36, n.17). Moreover, in addressing the qualification of the jury on direct appeal, the Nevada
23 Supreme Court found no error. (Exhibit 104, at p. 9). Petitioner has failed to meet his burden of
24 proving that the state court's ruling was contrary to, or involved an unreasonable application of,
25 clearly established federal law, as determined by the United States Supreme Court, or that the ruling
26 was based on an unreasonable determination of the facts in light of the evidence presented in the

1 state court proceeding. Petitioner's counsel was not ineffective and this Court denies habeas relief
2 with respect to Ground 2(b).

3 **Ground 2(c)**

4 DePasquale alleges that trial counsel Wessel failed to object to petitioner being forcibly
5 administered anti-psychotic medication during the trial. Petitioner asserts that this hindered his
6 ability to consult with counsel on his defense, and deprived the jury of the ability to observe him
7 when he was off medication, as he was at the time of the offense. (ECF No. 16, at p. 20).

8 While a prisoner has a substantial liberty interest in avoiding the unwarranted administration
9 of anti-psychotic drugs, the United States Supreme Court has held that convicted prisoners may be
10 treated with anti-psychotic drugs against their will if they are a threat to themselves or others and the
11 treatment is in the prisoner's medical interest. *Washington v. Harper*, 494 U.S. 210, 227-229 (1990).
12 In *Riggins v. Nevada*, 504 U.S. 127 (1992), the United States Supreme Court held that it was error to
13 order that a criminal defendant be administered anti-psychotic drugs during the course of a trial *over*
14 *his objection*, without findings that there were no less intrusive alternatives, that the medication was
15 medically appropriate, and that medication was essential for the sake of the defendant's safety or the
16 safety of others. *Riggins*, 504 U.S. at 135-38.² The Fifth Amendment's Due Process Clause permits
17 the government to involuntarily administer anti-psychotic drugs to a mentally ill defendant facing
18 serious criminal charges in order to render that defendant competent to stand trial, but only if the
19 treatment is medically appropriate, is substantially unlikely to have side effects that may undermine
20 the fairness of the trial, and taking account of less intrusive alternatives, is necessary significantly to

21
22 ² In the second amended petition, petitioner cites to *Riggins v. Nevada*, 504 U.S. 127 (1992).
23 Petitioner's conviction became final on October 23, 1991, at the conclusion of his direct appeal.
24 (Exhibit 127). The Ninth Circuit once held that *Riggins* should be applied retroactively. *Flowers v.*
25 *Walter*, 239 F.3d 1096 (9th Cir. 2001). However, the Ninth Circuit later withdrew that opinion, *Flowers v.*
26 *Walter*, 267 F.3d 1167 (9th Cir. 2001), and superceded it with *Flowers v. Walter*, 24 Fed. Appx. 658
(9th Cir. 2001). The final *Flowers* decision found that, in order for a new rule of constitutional law to
be made retroactive, the Supreme Court must expressly hold it to apply retroactively, and that the
Supreme Court had not done so in *Riggins*. *Flowers*, 24 Fed. Appx. at 659, citing *Tyler v. Cain*, 533
U.S. 656 (2001); *see also Bennett v. United States*, 119 F.3d 470, 471 (7th Cir. 1997) (*Riggins* not
retroactive).

1 further important governmental trial-related interests. *Sell v. United States*, 539 U.S. 166, 180-183
2 (2003).

3 In the instant case, there is no proof that petitioner was subjected to the forced administration
4 of anti-psychotic medication at any time during the trial. On September 5, 1989, the day before trial
5 commenced, the state district court conducted a final competency hearing, with testimony from
6 medical personnel, prison personnel, and the defendant. (Exhibit 64). The court issued an order
7 finding the defendant competent to stand trial. (Exhibit 65). During the pretrial competency hearing
8 that took place one day before trial commenced, defense counsel Wessel questioned Drs. Hensen and
9 Molde as to petitioner's competency. (Exhibit 64). To both doctors, Wessel posed hypotheticals as
10 to whether petitioner might be sleepy if he were to horde a few days' worth of his medications, and
11 then take the three days' worth of medication at one time. (Exhibit 64, at pp. 17, 19, 20). The trial
12 judge then questioned petitioner as to his medication. (Exhibit 64, at pp. 31-32). There is no
13 indication from the dialogue between the judge and petitioner that the medication he took was under
14 forced administration. Petitioner presents no evidence that any of his medications were forcibly
15 administered.

16 Additionally, during the first federal habeas proceeding in the instant case, Dr. St. Martin
17 conducted a records review of petitioner's medical history. (Exhibit 195, at Ex. B). He noted that in
18 1992, petitioner was forcibly treated with medications due to violent and self-injurious behavior.
19 (*Id.*, at p. 3). St. Martin further found that in 1999 prison staff instituted involuntary medical
20 treatment because petitioner was not compliant, and that forced administration of medication
21 continued thereafter. (*Id.*, at p. 2). The trial in the instant case took place in September of 1989.
22 (Exhibits 66-74). There is no indication in medical records or reports that petitioner was under the
23 forced administration of medications during trial, or that he was suffering from psychotic behavior at
24 that time. (Exhibit 195, at Ex B.). In the reply, petitioner states that: "In Claim 2C, petitioner
25 concedes there is no evidence in the record that Petitioner was forcibly medicated with anti-psychotic
26 drugs." (ECF No. 98, at p. 36, n.17). This Court finds that petitioner has failed to show that he was

1 forcibly medicated with anti-psychotic drugs during trial, and has failed to show any ineffectiveness
2 of counsel regarding his medication during trial. Habeas relief is denied as to Ground 2(c).

3 **Ground 2(d)**

4 DePasquale alleges that his right to a fair and unbiased jury was violated when trial counsel
5 failed to excuse a sitting juror, Larry Berg, who two times during trial revealed to the trial court that
6 he was subjected to intense pressure from co-workers to convict DePasquale and to vote for the
7 death penalty. (ECF No. 16, at pp. 20-21).

8 On the third day of trial, Larry Berg informed the trial court of comments that some of his co-
9 workers had made about finding the defendant guilty and that the penalty imposed should be death.
10 (Exhibit 69, at pp. 9-14). The trial court questioned Berg, outside the presence of the jury, and with
11 counsel present. (*Id.*). The trial court judge specifically asked Berg if the co-workers' comments
12 had compromised his ability to serve as a juror on the case. (*Id.*). Berg responded that the comments
13 had not compromised his ability to serve as a juror on the case. (*Id.*). When the trial judge asked
14 petitioner's trial counsel if he had any questions for Berg, Wessel stated that he was satisfied. (*Id.*).
15 The trial judge made the finding that Berg had followed the admonitions given to all the jurors and
16 that he was satisfied with Berg's responses. (*Id.*).

17 The second incident regarding juror Larry Berg occurred at the beginning of the penalty
18 phase. The trial court questioned Berg, outside the presence of the other jurors, regarding a second
19 incident in which someone at his workplace made an inappropriate comment to him about the trial
20 again. (Exhibit 76, at pp. 16-21). During this second incident, the court questioned Berg as to his
21 ability to consider the mitigating evidence and to consider the possible sentences. Defense counsel
22 Wessel questioned Berg regarding his ability to impose a penalty without being impacted by the
23 views of others, and his ability to reach a decision on the penalty. The trial court was satisfied that
24 Berg would not allow the comments of his co-workers to affect his duty on the jury, and that he
25 could remain on the jury. (*Id.*).

26 "One touchstone of a fair trial is an impartial trier of fact – a jury capable and willing to

1 decide the case solely on the evidence before it.” *Fields v. Brown*, 503 F.3d 755, 770 (9th Cir. 2007)
 2 (citations and quotations omitted). Petitioner cannot show that Berg was irreparably tainted by his
 3 co-workers’ comments. There is no demonstration of bias or dishonesty on Berg’s part. Petitioner
 4 has failed to demonstrate that his counsel was ineffective as to the inquiry of Berg, and in not
 5 seeking Berg’s dismissal from the jury. In addressing this issue on direct appeal, the Nevada
 6 Supreme Court held:

7 Appellant’s remaining contentions are meritless appellant claims
 8 it was error to allow juror Berg to remain seated after he had been
 9 twice exposed to outside pressure to return a death sentence. Juror
 10 Berg stated clearly for the record that he was not in any way prejudiced
 11 by the incidents. Defense counsel declined to object to Berg’s
 12 continued participation.

13 (Exhibit 104, at p. 9). The factual findings of the state court are presumed correct. 28 U.S.C. §
 14 2254(e)(1). Petitioner concedes in the reply that: “In Claim 2D, failure to dismiss Berg in the guilt
 15 phase, without more, can not be seen as an unreasonable decision, and the issue of guilt phase is
 16 moot in that DePasquale is no longer sentenced to death.” (ECF No. 98, at p. 36, n.17). Petitioner
 17 has failed to meet his burden of proving that the state court’s ruling was contrary to, or involved an
 18 unreasonable application of, clearly established federal law, as determined by the United States
 19 Supreme Court, or that the ruling was based on an unreasonable determination of the facts in light of
 20 the evidence presented in the state court proceeding. Petitioner’s counsel was not ineffective and
 21 habeas relief is denied as to Ground 2(d).

22 **Ground 2(e)**

23 DePasquale asserts that trial counsel failed to adequately investigate, prepare for, and present
 24 mitigation testimony at the penalty phase of trial. (ECF No. 16, at p. 21). Petitioner alleges that
 25 Wessel provided only two witnesses at the penalty phase, and that he failed to present evidence of
 26 mitigation, specifically, his sister’s mental health problems and that while a teenager, petitioner
 saved a woman from downing. (*Id.*).

Counsel must conduct sufficient investigation and preparation to present and explain the
 significance of all available mitigation evidence in the penalty phase of a capital case. *Williams v.*

1 *Taylor*, 529 U.S. 362, 399 (2000). However, defense counsel is not required to present every
2 possible piece of mitigating evidence during the penalty phase. *Wong v. Belmonte*, 130 S.Ct. 383,
3 388-391 (2009). The totality of available mitigating evidence includes evidence from both the trial
4 phase and the habeas proceedings. *Williams*, 529 U.S. at 397. The question for the court is whether
5 there is a reasonable possibility that, absent the errors, the sentencer would have concluded that the
6 balance of aggravating and mitigating factors did not warrant death. *Strickland*, 466 U.S. at 695. It
7 is necessary for the court “to consider all the relevant evidence that the jury would have had before
8 it.” *Wong*, 130 S.Ct. at 386. To establish prejudice, the petitioner must show “a reasonable
9 probability that the jury would have rejected a capital sentence after it weighed the entire body of
10 mitigating evidence . . . against the entire body of aggravating evidence.” *Id.*

11 In the instant case, defense attorney Wessel called petitioner’s sister, Enid Balavac, to testify
12 during the penalty phase as to mitigating factors. (Exhibit 76, at p. 62). Balavac testified that all
13 five children in the DePasquale family, including herself and petitioner, suffered extreme verbal
14 abuse from their mother, and that the family was highly dysfunctional. (*Id.*, at p. 62). Balavac
15 testified that due to the verbal abuse, all of the children suffered low self-esteem and no self worth,
16 which especially affected petitioner. (*Id.*, at pp. 62-63). She testified that petitioner began using
17 drugs at age eleven and became an extreme drug addict. (*Id.*, at pp. 63-65, 71-75). Balavac also
18 testified that she had required therapy because of the family dysfunction and low self-esteem. (*Id.*, at
19 pp. 76-77). She also testified that her sister had self esteem issues and had been diagnosed as manic
20 depressive. (*Id.*, at p. 77).

21 Regarding petitioner’s assertion that Wessel failed to present evidence that, as a teenager,
22 petitioner saved a young woman from drowning, petitioner fails to allege how that event would have
23 any impact on the penalty phase determination of the jury. The jury found two aggravating
24 circumstances: that the murder was committed while the defendant was under a sentence of
25 imprisonment and that he had previously been convicted of a felony involving the use or threat of
26 violence. (Exhibit 73, at pp. 1-2). A single incident from DePasquale’s teenage years, taken in total

1 with the other evidence as to his actions later in life and while in prison, would not have changed the
2 outcome of the penalty phase.

3 Petitioner's trial counsel presented evidence in support of mitigation, as discussed above.
4 Petitioner cannot show prejudice, because he cannot show that the mitigation evidence of his sister's
5 mental health problems, and evidence of his saving a woman from drowning, would have changed
6 the outcome of the penalty phase. Moreover, in his reply, petitioner states that: "Claim 2E is moot as
7 DePasquale is not sentenced to death." (ECF No. 98, at p. 36, n.17). Petitioner's counsel was not
8 ineffective and habeas relief is denied as to Ground 2(e).

9 **Ground 2(f)**

10 DePasquale alleges that trial counsel failed to challenge his competency to proceed for the
11 penalty phase, as petitioner suffered a mental deterioration between the guilt and penalty phases of
12 trial. (ECF No. 16, at p. 22).

13 Competence is defined as the ability to understand the proceedings and to assist counsel in
14 preparing a defense. *Dusky v. United States*, 362 U.S. 402 (1960); *Godinez v. Moran*, 509 U.S. 389
15 (1993). Whether a defendant is capable of understanding the proceedings and assisting counsel is
16 dependent upon evidence of the defendant's irrational behavior, his demeanor in court, and any prior
17 medical opinions on his competence. *Drope v. Missouri*, 420 U.S. 162, 180 (1975). None of the
18 factors are determinative, and any one of them may be sufficient to raise a reasonable doubt about
19 competence. *Id.* Counsel's failure to request that the trial court order a hearing on the issue of
20 competence could constitute ineffectiveness if the information would create doubt and a reasonable
21 probability that the defendant would have been found incompetent if the issue had been raised and
22 fully considered. *Williams v. Calderon*, 384 F.3d 567, 609-11 (9th Cir. 2004).

23 In the instant case, on September 18, 1989, after the return of the verdict and before the
24 penalty phase began, defense counsel Wessel reported to the Court that he had received information
25 regarding petitioner's behavior over the prior weekend. (Exhibit 76, at p. 1). Wessel reported that
26 petitioner refused a family visit on Saturday and that he acted inappropriately in front of his family

1 on Sunday, to the point that the visit was cut short. (*Id.*, at p. 2). The State reported that, pursuant to
2 officers, on the eve of the verdict petitioner made statements that he was not happy with the verdict,
3 and that the body count in Carson City would rise and more blood would flow. (*Id.*, at pp. 2-3).
4 Two family members reported to a guard that they did not think it wise to remove petitioner's
5 restraints during court. (*Id.*). The State noted that petitioner was more agitated while waiting in the
6 van that morning. (*Id.*, at p. 4). Wessel stated that petitioner's mental defects were contributing to
7 the events. (*Id.*, at p. 5). Wessel reported that after the verdict came in and the courtroom cleared,
8 petitioner did not want to talk to Wessel, did not want to deal with him, and was extremely hostile.
9 (*Id.*, at p. 7).

10 The trial court brought petitioner in, outside the presence of the jury, and asked him
11 questions. Petitioner gave the court his assurance that he would behave and allow Wessel to assist
12 him the best he could. (Exhibit 76, at p. 9). The court then answered a question petitioner had
13 regarding the availability of transcripts after trial. (*Id.*, at pp. 8-9). Defense counsel, the court, and
14 the State addressed the concerns as possible security problems or that petitioner might be disruptive
15 during the penalty phase proceedings. (*Id.*, at pp. 1-2, 4, 5, 8-9).

16 Petitioner has failed to show any factual basis that he was not competent to proceed to the
17 penalty phase of trial on September 18, 1989. The day before commencement of the guilt phase of
18 the trial, on September 5, 1989, the trial court held a hearing and found petitioner competent to stand
19 trial. (Exhibit 64, at p. 32). Later, when petitioner entered into a sentencing agreement in January
20 1993, changing his sentence from death to life without the possibility of parole, the court found
21 petitioner competent to enter into the agreement. (Exhibit 153). Later, psychiatrist Dr. St. Martin,
22 found that petitioner had no indication of psychosis between February 10, 1992, and February 26,
23 1996. (Exhibit 195, at Ex. B). Petitioner has not shown that he lacked the ability to consult with
24 counsel or understand the events during the penalty phase. In his reply, petitioner states: "Claim 2F
25 is moot in that DePasquale is not sentenced to death, and, further there does not appear to be a
26 factual basis in the record for the claim." (ECF No. 98, at p. 36, n.17). Petitioner's counsel was not

1 ineffective when he proceeded to the penalty phase of trial without requesting a competency hearing
2 for petitioner. Habeas relief is denied as to Ground 2(f).

3 **Ground 2(g)**

4 DePasquale asserts that trial counsel's failure to timely request the appointment of co-counsel
5 denied his right to effective assistance of counsel. (ECF No. 16, at pp. 22-23).

6 At the time of petitioner's trial in September 1989, the decision to appoint and compensate an
7 additional attorney to represent an indigent defendant was solely within the discretion of the state
8 court. NRS 260.060; *Sechrest v. State*, 101 Nev. 360, 705 P.2d 626 (1985), *overruled on other*
9 *grounds by Harte v. State*, 116 Nev. 1054, 13 P.3d 420 (2000).³

10 There is no federal constitutional requirement for the appointment of co-counsel in a capital
11 case. *Allen v. Woodford*, 395 F.3d 979 (9th Cir. 2005). "Trial counsel cannot be said to be
12 constitutionally ineffective for deciding not to bring in co-counsel, unless there is some reason . . .
13 why the first lawyer is unable to provide adequate representation." *Id.* at 998. While it might have
14 been wise to seek co-counsel, the first lawyer's failure to do so does not constitute deficient
15 performance. *Id.*

16 Wessel made an oral motion for appointment of co-counsel the day before trial. (Exhibit 64,
17 at p. 4). The trial court denied the motion. (*Id.*, at pp. 4-5). Wessel told the court that he could
18 outline the reasons for requesting co-counsel in a written motion, to which the court responded, "All
19 right." (*Id.*, at p. 5). Wessel did not file a written motion for the appointment of co-counsel. Given
20 that co-counsel was not required, it cannot be said that Wessel's failure to bring an earlier or written
21 motion for appointment of co-counsel fell below the objective standard of reasonableness under
22 prevailing professional norms. In the reply, petitioner states that: "Claim 2G is without merit in that
23 second counsel was not mandatory at the time of this case." (ECF No. 98, at p. 36, n.17). Petitioner
24 has not met his burden of overcoming the presumption that counsel's actions were objectively

25
26 ³ Rule 250 of the Nevada Supreme Court Rules provides minimum requirements for defense counsel in a capital case. Those requirements were not adopted until 2000, eleven years after petitioner's trial, and are not applicable to the instant case.

1 reasonable under prevailing norms. Additionally, petitioner has failed to establish prejudice, because
 2 he has not shown a reasonable probability that, but for counsel's failure to move for and obtain co-
 3 counsel, the result of the trial would have been different. Habeas relief is denied as to Ground 2(g).

4 **Ground 2(h)**

5 DePasquale asserts that he was denied his Sixth Amendment right to counsel due to trial
 6 counsel's cumulative errors. (ECF No. 16, at p. 23). The Ninth Circuit has held "the Supreme Court
 7 has clearly established that the combined effect of multiple trial errors may give rise to a due process
 8 violation if it renders a trial fundamentally unfair, even where each error considered individually
 9 would not require reversal." *Parle v. Runnels*, 505 F.3d 922, 928 (2007) (citing *Donnelly v.*
 10 *DeChristoforo*, 416 U.S. 637, 643 (1974) and *Chambers v. Mississippi*, 410 U.S. 284, 290, n.3
 11 (1973)). "[T]he fundamental question in determining whether the combined effect of trial errors
 12 violated a defendant's due process rights is whether the errors rendered the criminal defense far less
 13 persuasive . . . and thereby had a substantial and injurious effect or influence on the jury's verdict."
 14 *Parle v. Runnels*, 505 F.3d at 928 (internal quotations and citations omitted).

15 As discussed *supra*, each of petitioner's individual claims of ineffective assistance of counsel
 16 fail. Petitioner has not shown that counsel's alleged cumulative errors had a substantial and
 17 injurious effect on the jury's verdict, or that the alleged errors resulted in a fundamentally unfair trial.
 18 This Court denies habeas relief as to Ground 2(h).

19 **3. Ground Three**

20 DePasquale alleges that his state court conviction for murder was unconstitutional because he
 21 was tried and sentenced while he was under forced administration of anti-psychotic medication
 22 which rendered him incapable of assisting counsel in his own defense. (ECF No. 16, at p. 23).
 23 Petitioner alleges that the district court failed to, *sua sponte*, address the issue of petitioner's forced
 24 medication with anti-psychotic drugs and to determine if such were medically reasonable or if there
 25 were a less onerous measure available. (*Id.*). As discussed earlier in this order, at Ground 2(c), there
 26 is no evidence that petitioner was subjected to the forced administration of medications. In the reply,

1 petitioner concedes that “there is no evidence in the record that Petitioner was forcibly medicated
2 with anti-psychotic drugs.” (ECF No. 98, at p. 36, n.17). There is no requirement for a state court to
3 consider whether a medication is medically reasonable or if a less onerous measure is available when
4 the medication is prescribed by a physician and, as in the instant case, the defendant voluntarily takes
5 the medication. *See Washington v. Harper*, 494 U.S. 210 (1990). As such, habeas relief is denied as
6 to Ground Three.

7 **4. Ground Four**

8 DePasquale alleges ineffective assistance of appellate counsel Thomas Perkins. Petitioner
9 alleges that Perkins failed to raise on direct appeal the ineffective assistance of counsel claims
10 alleged in Grounds Two (A) through (H) of the petition. (ECF No. 16, at p. 24).

11 The *Strickland* standard applies to challenges of effective appellate counsel. *Smith v.*
12 *Robbins*, 528 U.S. 259, 285 (2000). As to the prejudice requirement, petitioner must prove that, but
13 for counsel’s alleged errors, he would have prevailed on appeal. *Id.* Appellate counsel has no
14 constitutional duty to raise every non-frivolous issue requested by the client. *Jones v. Barnes*, 463
15 U.S. 745, 751-54 (1983). Petitioner must show that his counsel unreasonably failed to discover and
16 file nonfrivolous issues. *Delgado v. Lewis*, 233 F.2d 976, 980 (9th Cir. 2000).

17 Claims of ineffective assistance of counsel are normally not brought on direct appeal in
18 Nevada. *Pelligrini v. State*, 117 Nev. 860, 833-84, 34 P.3d 519, 534-35 (2001). Claims of
19 ineffective assistance of counsel are reserved for post-conviction litigation in Nevada. *Id.* In the
20 instant case, appellate counsel’s actions did not fall below the objective standard of reasonableness
21 under prevailing norms in failing to raise issues of ineffectiveness of counsel on direct appeal. The
22 Court denies habeas relief on Ground Four.

23 **5. Ground Five**

24 Petitioner alleges: “Depasquale’s Fifth, Sixth, and Fourteenth Amendment rights were
25 violated when he did not knowingly, intelligently, and voluntarily enter into the sentencing
26 agreement in January 1993, and the judgment entered thereon, in which he was sentenced to life

1 imprisonment without parole and for which he agreed to the dismissal of his state post conviction
2 habeas petition and his right to appeal from the judgment entered.” (ECF No. 16, at p. 24).
3 Petitioner refers to the memorandum of agreement, signed by the State and petitioner on January 6,
4 1993, in which the State agreed to make an unspecified confession of error at the penalty hearing and
5 the parties agreed that, subject to court approval, petitioner’s sentence would be converted from the
6 death penalty to life without the possibility of parole. (Exhibit 152).

7 Under federal law, to be valid, a guilty plea must be knowing, voluntary, and intelligent. *U.S.*
8 *v. Brady*, 397 U.S. 742, 748 (1970). A guilty plea must represent a voluntary and intelligent choice
9 among alternative courses of action open to a defendant. *Hill v. Lockhart*, 474 U.S. 52, 56 (1985).
10 Advice for a guilty plea does not require a description of every element of the offense. *Bargas v.*
11 *Burns*, 179 F.3d 1207, 1216 (9th Cir. 1999) (citation omitted). The court looks to what a defendant
12 reasonably understood at the time of the plea. *U.S. v. Quan*, 789 F.2d 711, 713 (9th Cir. 1986). The
13 record must demonstrate that the defendant understands that he is waiving his privilege against self-
14 incrimination, his right to a jury trial, and his right to confront accusers. *Boykin v. Alabama*, 395
15 U.S. 238, 243 (1969). “Solemn declarations in open court carry a strong presumption of verity.”
16 *Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977); *see also United States v. Anderson*, 993 F.2d 1435,
17 1438 (9th Cir. 1993) (defendant’s statements, made in open court at time of his plea, are entitled to
18 great weight).

19 In the instant case, Judge Fondi conducted a thorough and lengthy canvass of DePasquale on
20 January 6, 1993, the day the court re-sentenced him to life without the possibility of parole, pursuant
21 to the plea memorandum. (Exhibit 153). At the end of the canvass, Judge Fondi found that
22 petitioner was competent to enter the agreement and did so voluntarily, making these findings of
23 fact:

24 This Court will make an affirmative finding that I find that the
25 memorandum that has been signed has been signed as a result of what
26 I consider a thorough and complete canvass and discussion with Mr.
DePasquale prior to his signature on this document.

I affirmatively find that the document was signed voluntarily and for

1 the purposes state therein.

2 And that as a result of my discussion with Mr. DePasquale, I find that
3 I'm satisfied that you are competent today to make this decision, and
4 that you have articulated to me the medications you're on, and your
5 understanding of what that's doing to you, and that we have taken
6 enough time to even give you a little caffeine in the coffee that you had
7 to help you kind of mellow those out a little bit so you were able to
8 deal with this a little more effectively

9 (Exhibit 153, at p. 50, lines 2-17). The state district court's finding that petitioner was competent
10 and that he knowingly and voluntarily signed the sentencing agreement is entitled to deference. 28
11 U.S.C. § 2254(e)(1). In the reply, petitioner concedes that Ground 5 is without merit. (ECF No. 98,
12 at p. 46). Petitioner has failed to meet his burden of proving that the state court's ruling was contrary
13 to, or involved an unreasonable application of, clearly established federal law, as determined by the
14 United States Supreme Court, or that the ruling was based on an unreasonable determination of the
15 facts in light of the evidence presented in the state court proceeding. The Court denies habeas relief
16 with respect to Ground Five.

14 **6. Ground Six**

15 DePasquale alleges that his Sixth and Fourteenth Amendment rights were violated when
16 post-conviction counsel, Thomas Perkins, failed to adequately investigate his competency to enter
17 into the January 1993 sentencing agreement in which he received life imprisonment without the
18 possibility of parole and in which he waived his challenge of his conviction and his appellate rights.
19 (ECF No. 16, at p. 26).

20 Ineffectiveness of counsel "during Federal or State collateral post-conviction proceedings
21 shall not be a ground for relief in a proceeding arising under section 2254." 28 U.S.C. § 2254(i); *see*
22 *also Smith v. Idaho*, 383 F.3d 934, 939 (9th Cir. 2004). Additionally, prior to and during the hearing,
23 there was nothing to suggest that DePasquale was incompetent or that his counsel had reason to
24 question his competency. As discussed *supra* at Ground 5, on January 6, 1993, the state trial court
25 found that petitioner was competent and that he knowingly and voluntarily signed the sentencing
26 agreement. (Exhibit 153). The factual findings of the state court are presumed correct. 28 U.S.C. §

2254(e)(1). Post-conviction counsel's actions did not fall below the objective standard of reasonableness under prevailing norms. The Court denies habeas relief on Ground Six.

7. Ground Seven

Depasquale alleges violation of his Fifth and Sixth Amendment rights when a prison guard performing security duties, during a court-ordered competency evaluation, elicited a statement from DePasquale, who previously had invoked his right to counsel. Specifically, Officer Messick alleged that during a break between examinations, Depasquale stated: "It's a game. You have to talk to each one differently." The statement was presented by the prosecution at trial in rebuttal to petitioner's defense of insanity. (ECF No. 16, at p. 27). The Nevada Supreme Court addressed this issue on direct appeal, as follows:

Appellant's third argument is that the trial court erred in admitting statements made to a correctional officer during a break between psychiatric examinations. We find that there was no error.

On August 11, 1989, Correctional Officer John Messick transported appellant to Lake's Crossing to be examined by Dr. Molde and Dr. Henson. In between examinations, appellant looked at Officer Messick and smiled. Officer Messick smiled back and shook his head. Appellant responded by saying "It's just a game. You have to talk to each one of them differently."

No *Miranda* warnings were given on the scene. However, appellant had previously been informed of his *Miranda* rights by the court.

The court allowed the State to present appellant's statement during the rebuttal case in response to the insanity defense. The State's theory was that appellant constructed a facade of mental illness to avoid responsibility for his conduct.

Preliminarily, we note that psychiatric examination for the limited purpose of rebutting a defendant's insanity defense does not implicate the Fifth Amendment. *Buchanan v. Kentucky*, 483 U.S. 402, 107 S.Ct. 2906, 97 L.Ed.2d 336 (1987); see also *Haynes v. State*, 103 Nev. 309, 318, 739 P.2d 497, 503 (1987) (statement is not "incriminatory" merely because it tends to show that the defendant is sane). Thus, it is questionable whether the Fifth Amendment even applies to this statement. We need not reach this issue, however, as we determine that Officer Messick's action of shaking his head did not constitute a custodial interrogation. See *Rhode Island v. Innis*, 446 U.S. 291, 64 L.Ed.2d 297 (1980).

(Exhibit 104, at p. 3). The Nevada Supreme Court found that nothing in Messick's conduct was

1 designed to elicit a response from petitioner. In the reply, petitioner concedes that this claim is
2 without merit. (ECF No. 98, at pp. 47-48). The factual findings of the state court are presumed
3 correct. 28 U.S.C. § 2254(e)(1). Petitioner has failed to meet his burden of proving that the state
4 court's ruling was contrary to, or involved an unreasonable application of, clearly established federal
5 law, as determined by the United States Supreme Court, or that the ruling was based on an
6 unreasonable determination of the facts in light of the evidence presented in the state court
7 proceeding. The Court denies habeas relief with respect to Ground Seven.

8 **8. Ground Eight**

9 Petitioner alleges that his state court conviction for murder is unconstitutional because the
10 evidence presented at trial was insufficient to support a conviction of murder in the first degree.
11 (ECF No. 16, at p. 27). When a habeas petitioner challenges the sufficiency of evidence to support
12 his conviction, the court reviews the record to determine "whether, after viewing the evidence in the
13 light most favorable to the prosecution, any rational trier of fact could have found the essential
14 elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979);
15 *Jones v. Wood*, 207 F.3d 557, 563 (9th Cir. 2000). The court must assume that the jury resolved any
16 evidentiary conflicts in favor of the prosecution, and the court must defer to that resolution. *Jackson*,
17 443 U.S. at 326; *Schell v. Witek*, 218 F.3d 1017, 1023 (9th Cir. 2000) (*en banc*). The credibility of
18 witnesses is beyond the scope of the court's review of the sufficiency of the evidence. *See Schlup v.*
19 *Delo*, 513 U.S. 298, 330 (1995). Under the *Jackson* standard, the prosecution has no obligation to
20 rule out every hypothesis except guilt. *Wright v. West*, 505 U.S. 277, 296 (1992) (plurality opinion);
21 *Jackson*, 443 U.S. at 326; *Schell*, 218 F.3d at 1023. *Jackson* presents "a high standard" to habeas
22 petitioners claiming insufficiency of the evidence. *Jones v. Wood*, 207 F.3d 557, 563 (9th Cir.
23 2000).

24 In addressing the issue of sufficiency of evidence, the Nevada Supreme Court ruled:

25 Turning now to some of the more difficult issues, we first consider
26 whether the evidence was sufficient as a matter of law to support a
conviction of murder in the first degree.

1 The standard of review regarding sufficiency of the evidence is
2 whether any reasonable trier of fact could have found the essential
3 elements of the crime beyond a reasonable doubt. *Wilkins v. State*, 96
4 Nev. 367, 609 P.2d 309 (1980).

5 As evidence of premeditation and deliberation, the prosecution put
6 forth a letter written by the defendant (dated February 21, 1988) in
7 which he said "I am immature in a lot of ways, more like a stubborn,
8 rebellious child. I do need to learn responsibility and accountability in
9 my life." Other than this, the only real evidence of premeditation and
10 deliberation was the beating itself. No motive for the killing was
11 presented.

12 Appellant argues that the evidence presented cannot support a jury's
13 finding of premeditation and deliberation. We disagree.
14 Premeditation is generally established by circumstantial evidence.
15 *Hern v. State*, 97 Nev. 529, 533, 635 P.2d 278, 281 (1981).
16 Premeditation and deliberation can be inferred from the nature and
17 extent of injuries, coupled with repeated blows. *Id.* Given the brutal
18 and extensive nature of Mr. Cane's injuries (including injuries to the
19 head, torso, ribs, and back), an inference of premeditation and
20 deliberation can be reasonably drawn. This is particularly true when
21 considering the metal rod which was inserted deeply into the victim's
22 ear. It is difficult to imagine such a process occurring without
23 deliberate thought.

24 Appellant asserts that his composite psychiatric history, combined with
25 the clearly impulsive nature of the offense, negates any possibility that
26 the offense was committed on rational deliberation of the kind thought
to separate first from second degree murder. We conclude otherwise.

Several psychiatrists testified as to appellant's psychiatric condition.
The consensus was that appellant suffers from both episodic psychosis
[footnote 3: Appellant has a history of psychotic episodes. On one
occasion, appellant pulled his own eye out of its socket.] and a
sociopathic personality disorder. The relevant question is whether
appellant was acting while in a psychotic state, or whether he was
merely exhibiting his sociopathic tendencies.

The jury found that some or all of the aggravating factors arose while
appellant was under the influence of extreme mental or emotional
disturbance. The jury declined to find, however, that appellant was
under the influence of extreme mental or emotional disturbance when
he murdered Ronald Cane. The jury's finding should not be disturbed
if it is support by substantial evidence.

Prison psychologist Mace Knapp testified that he had observed
appellant leaving the chess club at 6:20 p.m. on February 2, 1988.
Appellant appeared normal and rational. Approximately two hours
later appellant was pulled out of his cell and the body of Ronald Cane
was discovered. Appellant was very talkative, yet calm and
cooperative. He acknowledged the presence of Officer Bauer and

1 Sergeant Cartwright.

2 Defense counsel brought various inmates to testify that appellant was
3 acting “bizarre” on the day of the incident. The jury nevertheless
4 found the prosecution testimony persuasive. Substantial evidence
5 supports the jury’s finding. We therefore conclude, that appellant’s
6 psychiatric history does not negate the jury’s finding of premeditation
7 and deliberation.

8 (Exhibit 104, at pp. 5-7). The Nevada Supreme Court cited to and applied *Wilkins v. State*, 96 Nev.
9 367, 609 P.2d 309 (1980), a case which cited to *Jackson v. Virginia*, 443 U.S. 307 (1979), the federal
10 standard for insufficiency of the evidence claims. The factual findings of the state court are
11 presumed correct. 28 U.S.C. § 2254(e)(1). Moreover, in the reply, “[p]etitioner concedes that the
12 Nevada Supreme Court’s decision is entitled to the presumption of correctness” (ECF No. 98,
13 at p. 48). Petitioner has failed to meet his burden of proving that the state court’s ruling was contrary
14 to, or involved an unreasonable application of, clearly established federal law, as determined by the
15 United States Supreme Court, or that the ruling was based on an unreasonable determination of the
16 facts in light of the evidence presented in the state court proceeding. The Court denies habeas relief
17 with respect to Ground Eight.

18 **9. Ground Nine**

19 DePasquale alleges his state court conviction for murder is unconstitutional because the
20 instruction on reasonable doubt permitted the jury to find guilt at a level less than the evidentiary
21 certainty required by law. Petitioner challenged the instruction as to proof beyond a reasonable
22 doubt pursuant to NRS 175.211. (ECF No. 16, at p. 28). Petitioner challenges the “actual and
23 substantial” language in the Nevada reasonable doubt jury instruction.

24 Nevada defines reasonable doubt as:

25 A reasonable doubt is one based on reason. It is not merely possible
26 doubt, but is such a doubt as would govern or control a person in the
more weighty affairs of life. If the minds of the jurors, after the entire
comparison and consideration of all the evidence, are in such a
condition that they can say they feel an abiding conviction of the truth
of the charge, there is not reasonable doubt. Doubt to be reasonable
must be actual and substantial, not mere possibility or speculation.

(Exhibit 215, Instruction No. 16; Exhibit 216, Instruction No. 13). The Nevada Supreme Court has

continuously upheld Nevada's statutory "reasonable doubt" jury instruction. *See, e.g., Browning v. State*, 120 Nev. 347, 359, 91 P.3d 39, 48 (2004); *Randolph v. State*, 117 Nev. 970, 981, 36 P.3d 424, 431 (2001); *Rodriguez v. State*, 117 Nev. 800, 811, 32 P.3d 773, 780-81 (2001). The Ninth Circuit has also upheld Nevada's statutory "reasonable doubt" jury instruction. *Nevius v. McDaniel*, 218 F.3d 940, 944 (9th Cir. 2000); *Ramirez v. Hatch*, 136 F.3d 1209, 1215 (9th Cir. 1998). In the reply, "[p]etitioner concedes both Nevada and Ninth Circuit law finds that the reasonable doubt instruction codified in Nev. Rev. St. 175.211 does not violate due process." (ECF No. 98, at p. 48). Because the Ninth Circuit has upheld Nevada's statutory "reasonable doubt" jury instruction, this Court denies habeas relief as to Ground Nine.

10. Ground Ten

Petitioner alleges his state court conviction for murder is unconstitutional, and is in violation of his Sixth Amendment right to be informed of the nature and cause against him and due process because the State was permitted to change its theory of the case after the close of defense and the close of evidence. (ECF No. 16, at p. 29). During the prosecution's rebuttal, the trial court allowed the state to delete the words "with hands and fists," while the remainder of the charge, that petitioner had beat the victim and stabbed him with a sharp, pointed instrument, remained. Petitioner asserts that this change deprived him of knowledge of the nature or theory of the charges and as such, deprived him of due process and the ability to defend himself.

The Nevada Supreme Court addressed this issue on petitioner's direct appeal:

Appellant's next contention is that the court erred in concluding its case-in-chief. The original information, dated January 20, 1989, charged that appellant did 'with malice aforethought, deliberation and premeditation, kill Ronald Cane by stabbing him with a sharp, pointed instrument, and beating him with his hands and fists, in violation of Sections 200.010 and 200.030.' The amended information, dated September 14, 1989, reads exactly the same except that the words 'with hands and fists' were deleted.

An indictment is sufficient if the offense is clearly and distinctly set forth in ordinary and concise language. *Brimmage v. State*, 93 Nev. 434, 440, 567 P.2d 54, 58 (1977). Amendments are allowed where the court makes a finding that no substantial rights of the defendant are prejudiced. *See State v. Jones*, 96 Nev. 71, 73-74, 605 P.2d 202, 206

(1980) (reversible error exists only where the variance between the charge and proof was such as to affect the substantial rights of the accused); *Biondi v. State*, 101 Nev. 252, 256, 699 P.2d 1062, 1064-1065 (1985) (presentation of alternate theory during closing argument was not prejudicial where defendant was able to properly prepare defense).

Appellant asserts that he was prejudiced by the amendment. At trial, appellant proffered evidence that Mr. Cane was killed with a heavy club and that appellant had no club or other weapon. Appellant asserts that the State, by amending the information, changed its theory as to the means by which Cane was killed.

The record does not support appellant's contention. The district court properly found that the amended language was neither inconsistent with the defense, nor the State's case. Moreover, defense hypotheticals of sitting on top of the victim and slamming his head into the floor gave grounds to amend. We therefore conclude, that appellant was not prejudiced by the amendment.

(Exhibit 104, at pp. 3-5). The factual findings of the state court are presumed correct. 28 U.S.C. § 2254(e)(1). In the reply, petitioner concedes that habeas relief is not warranted on Ground Ten. (ECF No. 98, at p. 48). Petitioner has failed to meet his burden of proving that the state court's ruling was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court, or that the ruling was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. The Court denies habeas relief on Ground Ten.

11. Ground Eleven

DePasquale alleges that the trial court's refusal of appoint co-counsel to assist counsel deprived him of effective assistance of counsel in violation of his Sixth and Fourteenth Amendments. (ECF No. 16, at p. 30). The Nevada Supreme Court addressed this issue and held:

Appellant first contends that it was error to deny his pre-trial motion for appointment of co-counsel. We conclude that there was no error. Appointment of co-counsel is discretionary, even in a capital case. *Sechrest v. State*, 101 Nev. 360, 705 P.2d 626 (1985). Denial of co-counsel is appropriate when the amount of preparation and investigation required is not unduly burdensome. *Id.* Since appellant's oral motion for counsel took place on the day before the trial was to commence, preparation and investigation were already complete.

(Exhibit 104, at p. 2). The factual findings of the state court are presumed correct. 28 U.S.C. § 2254(e)(1). Moreover, in the reply, petitioner concedes that habeas relief is not warranted on Ground Eleven. (ECF No. 98, at p. 48). Petitioner has failed to meet his burden of proving that the state court's ruling was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court, or that the ruling was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Habeas relief is denied with respect to Ground Eleven.

12. Ground Twelve

DePasquale alleges his state court conviction for murder was unconstitutional because the trial judge admitted a prior felony conviction into evidence without giving a limiting instruction, which impermissibly affected the burden of proof. (ECF No. 16, at p. 30). Federal habeas corpus relief is generally not available to review questions regarding the admissibility of evidence in state court. *Estelle v. McGuire*, 502 U.S. 62 (1991). The relevant inquiry is whether the evidence was so prejudicial that its admission violated fundamental due process and the right to a fair trial. *Fuller v. Roe*, 182 F.3d 699, 703 (9th Cir. 1999).

The Nevada Supreme Court addressed this issue on petitioner's direct appeal, as follows:

Appellant's remaining contentions are meritless [A]ppellant alleges error in that a previous judgment of conviction was entered during the guilt phase of the trial. Appellant opened the door, however, to this admission. It was appellant's witness, Dr. Master, who testified regarding the assault in question and concluded that appellant may have been unable to distinguish right from wrong at that time. On rebuttal, the State then offered the judgment of conviction as evidence that appellant knowingly pled to the assault. Since appellant was found competent to enter the plea, he was presumed to be sane at the time of the commission of the offense.

(Exhibit 104, at p. 9). The factual findings of the state court are presumed correct. 28 U.S.C. § 2254(e)(1). On review of the record, this Court does not find evidence of the prior conviction so prejudicial that its admission violated fundamental due process and the right to a fair trial. *See Fuller v. Roe*, 182 F.3d 699, 703 (9th Cir. 1999). In the reply, petitioner concedes that habeas relief is not warranted on Ground Twelve. (ECF No. 98, at p. 49). Petitioner has failed to meet his burden of

1 proving that the state court's ruling was contrary to, or involved an unreasonable application of,
2 clearly established federal law, as determined by the United States Supreme Court, or that the ruling
3 was based on an unreasonable determination of the facts in light of the evidence presented in the
4 state court proceeding. The Court denies habeas relief with respect to Ground Twelve.

5 **13. Ground Thirteen**

6 DePasquale alleges ineffective assistance of counsel when trial counsel failed to timely filed
7 a motion for a new trial, which resulted in its denial the loss of the possibility that the trial court
8 would grant the motion. (ECF No. 16, at p. 31). The verdict was entered on September 14, 1989.
9 NRS 176.515(4) provides that a motion for new trial must be filed within seven days of the finding
10 of guilt. Petitioner's counsel filed his motion for new trial eight days later, on September 22, 1989,
11 making the motion untimely by one day. (Exhibit 77). The trial court denied the motion as
12 untimely. (Exhibit 87; Exhibit 104, at p. 9). To succeed on this claim, petitioner must demonstrate
13 that the claims raised in the motion had merit. *See United States v. Booker*, 981 F.2d 289, 294 (7th
14 Cir. 1992) (counsel was not ineffective for failing to bring a motion when the motion would have
15 been denied). In the instant case, petitioner has not demonstrated that the grounds raised in the
16 motion for new trial had merit. In the reply, petitioner concedes that he cannot prove the possibility
17 of the trial court's granting the motion for a new trial, and therefore cannot prove prejudice. (ECF
18 No. 98, at p. 50). Petitioner's counsel was not ineffective and habeas relief is denied as to Ground
19 Thirteen.

20 **IV. Certificate of Appealability**

21 In order to proceed with an appeal, petitioner must receive a certificate of appealability. 28
22 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th Cir. R. 22-1; *Allen v. Ornoski*, 435 F.3d 946, 950-951
23 (9th Cir. 2006); *see also United States v. Mikels*, 236 F.3d 550, 551-52 (9th Cir. 2001). Generally, a
24 petitioner must make "a substantial showing of the denial of a constitutional right" to warrant a
25 certificate of appealability. *Id.*; 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84
26 (2000). "The petitioner must demonstrate that reasonable jurists would find the district court's

1 assessment of the constitutional claims debatable or wrong.” *Id.* (quoting *Slack*, 529 U.S. at 484). In
2 order to meet this threshold inquiry, the petitioner has the burden of demonstrating that the issues are
3 debatable among jurists of reason; that a court could resolve the issues differently; or that the
4 questions are adequate to deserve encouragement to proceed further. *Id.* This Court has considered
5 the issues raised by petitioner, with respect to whether they satisfy the standard for issuance of a
6 certificate of appealability, and determines that none meet that standard. The Court will therefore
7 deny petitioner a certificate of appealability.


8 **V. Conclusion**

9 **IT IS THEREFORE ORDERED** that the second amended petition for a writ of habeas
10 corpus is **DENIED IN ITS ENTIRETY**.

11 **IT IS FURTHER ORDERED** that petitioner is **DENIED A CERTIFICATE OF**
12 **APPEALABILITY**.

13 **IT IS FURTHER ORDERED** that the Clerk **SHALL ENTER JUDGMENT**
14 **ACCORDINGLY**.

15 Dated this 7th day of March, 2011.

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18 UNITED STATES DISTRICT JUDGE
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